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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 536

ROBERT RUSSELL TYRRELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

PHILANDER BROOKS BEADLE,
MORTON L. SILVERS,
1095 Market Street, San Francisco 3, California,
VICTOR E. CAPPA,
461 Market Street, San Francisco 5, California,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Robert Russell Tyrrell, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth

Circuit, entered on November 3, 1952 [C.R. 48]* which judgment affirmed the conviction of petitioner for violating Section 12(a) of the Selective Service Act of 1948 (50 U.S.C.A., App. 462(a)).

OPINION BELOW.

On the date of the submission of this Petition the opinion of the United States Court of Appeals for the Ninth Circuit was not yet officially reported.

JURISDICTION.

1. The judgment of the Court of Appeals was entered on November 3, 1952 [C.R. 48] and the Order denying Petition for Re-Hearing was entered on December 10, 1952. [C.R. 49]. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

2. The bases upon which it is contended that the Supreme Court has jurisdiction herein, and the cases which support such jurisdiction are, in part, as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court, this Court has juris-

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*References to the Clerk's Record of proceedings in the Court of Appeals for the Ninth Circuit are preceded by the initials "C.R." References to the Reporter's Transcript of the proceedings in the District Court are designated "R.", preceded by the page and followed by the line numbers.

diction on certiorari to review the action of the Circuit Court of Appeals. (Rule 38 of the Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.,* 313 U.S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price,* 309 U.S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice Co. v. National Labor Relations Board,* 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson,* 305 U.S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corporation v. El Isleo,* 308 U.S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo,* 297 U.S. 530, 56 S. Ct. 580, 80 L. Ed. 844; *Le Tulle v. Scofield,* 308 U.S. 531, 60 S. Ct. 75, 84 L. Ed. 447; *McNabb v. United States,* 318 U.S. 332, 87 L. Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented, or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam*

Co., 316 U.S. 149, 62 S. Ct. 966, 86 L. Ed. 1336; *Williams v. Jacksonville Terminal Company,* 314 U.S. 590, 62 S. Ct. 64, 86 L. Ed. 476; *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed. 930; *Sprague v. Ticonic National Bank,* 306 U.S. 623, 59 S. Ct. 463, 83 L. Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States,* 315 U.S. 60.)

STATEMENT OF MATTERS INVOLVED.

Robert Russell Tyrrell became a member of Christ's Church of the Golden Rule in 1944. He was then fourteen years old. He entered the church with his mother. Since 1944 he had devoted himself exclusively to work and study as a student minister of the church. (250 R 10-23.)

The basic purpose of the Church was to teach its members to apply in every-day living the doctrines and principles of Jesus Christ, who was looked upon as the "Wayshower". (206 R 6-24; Def.'s Exhibit K, 64 R 23 to 65 R 4.) The Church maintained a theological seminary in which young Tyrrell was enrolled. (187 R 10-13; 200R 10-12). The seminary divided its training program for student ministers between study of the ideals and principles of Christ and practical demonstrations of the application of the Golden

Rule in human relationships. (187 R 19-25; 194 R 6-11.) The application phase of the program was the portion which received the heaviest emphasis. (200 R 17-25; 201 R. 1-7.)

To this latter end the Church authorized the establishment of various "projects" under the supervision of ecclesiastical officials known as "project managers". For some two years prior to his indictment Robert Russell Tyrrell had been participating in one of the Church's training projects on a ranch in Oregon. (218 R. 18-25; 210 R 1-6.)

On February 25, 1947, on attaining his eighteenth birthday, petitioner registered pursuant to Selective Service Regulations. (Govt. Exhibit No. 1, 42 R 4-9.) On June 12, 1950 his Selective Service Questionnaire was filed with local board No. 38 in San Francisco, California. (Govt. Exhibit No. 3, 44 R 9-14.) In it he stated he was a full-time student preparing for the ministry under the direction of Christ's Church of the Golden Rule, and was attending a training project at Lakecreek, Oregon. He requested a 4-D classification. On June 20, 1950, the local board classified him in 4-D by a vote of three to zero and sent him a notice of this classification. (48 R 6-13; 90 R 2-22.)

Slightly more than two months later, on August 28, 1950, petitioner's classification was changed from 4-D to 1-A. (49 R 1-4; 90 R 23 to 91 R 4.) The minutes of the local board indicated a notice of this classification was mailed to petitioner on August 29, 1950

(Govt. Exhibit No. 3, 46 R 7-12), although petitioner never received the notice. (223 R 19-21.)

Petitioner's Selective Service file on August 28, 1950, contained the same written information as on June 20, 1950. It was made up of his Selective Service registration card; change of address letter; Selective Service Questionnaire; letter from the Theological Seminary certifying to his full time enrollment as a student minister; a "miniature sermon"; and registrant's statement regarding classification. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10); Govt. Exhibits Nos. 1, 2; (44 R 9-15) 3; Defendant's Exhibits A and B, 68 R 20 to 69 R 19.)

On December 5, 1950, petitioner was sent an order to report for physical examination. (Govt. Exhibit No. 4, 49 R 20 to 50 R 2.) This was his first knowledge of any change from his 4-D classification. (222 R 10-13.) He reported on December 18, 1950, and on being informed of the 1-A classification of August 28, 1950, requested a duplicate notice of classification. (223 R 13-23; Govt. Exhibit No. 5.) After receiving notice of physical acceptability petitioner requested a hearing before the local board. (Govt. Exhibit No. 6, 51 R 17-25.)

The hearing was held on January 8, 1951, before board members Dooley and Bonzani. (325 R 11-17.) Testimony was conflicting concerning some of the events that took place at that time. Petitioner stated the board members, after consulting a list or book, informed him Christ's Church of the Golden Rule was not listed, was not a recognized church, and "could

not be accepted." (227 R 7-18.) Board member Dooley testified he told the petitioner his divinity school was not on the Selective Service list, and further, that that list represented the "recognized divinity schools in the State of California". (328 R 7-25; 330 R 21-23.)

Board member Bonzani said they used the list (Def.'s Exhibit X, 333 R 14-17) to determine if the Theological Seminary of Christ's Church of the Golden Rule was a recognized school. (357 R 6-16.) That he never inquired as to what was considered ministerial training by that church. (358 R 4-9.) That the board simply "follows the list on the recognized schools". (357 R 17 to 358 R 3.)

Petitioner further stated that when he repeatedly attempted to describe the nature and significance of the work he did on the ranch training project—i.e. that it was all part of his studies and was the practical application of the Church's teachings—he was cut short with the reply that anyone on the street could do that. (229 R 1-8; 260 R 2-7; 262 R 1-8; 294 R 3-12.) Board member Dooley confirmed petitioner's efforts to make this explanation. (333 R 23 to 334 R 10.)

Petitioner was queried about the operations of a Church laundry in Petaluma. (229 R 14-23; 262 R 18-25; 263 R 1-5.) Board member Dooley was the attorney for the San Francisco Laundry Owners and the San Francisco Linen Supply Group. (335 R 3-14.) He stated he didn't think much of a church that worked elderly people at a mangle. (263 R 2-14.)

Board member Dooley was the only one who questioned petitioner at the hearing. (350 R 8-12.) It was he who prepared the written summary of the hearing. He stated his notes were made "in case an appeal is taken, the appeal board will understand what our position was." (325 R 24-25, 326 R 1; 345 R 14-18.) The summary described the petitioner as "employed" on a ranch with the "primary occupation" of a "general ranch hand" and "utility worker." There was no mention of petitioner's version of the significance of the ranch work. On the contrary, the summary made an express division between time spent on "church work" and time spent on "ranch work". (Govt. Exhibit No. 7, 53 R 2 to 54 R 4.) Petitioner was not shown, and never saw, the record of the hearing. (232 R 6-15.)

Board member Dooley stated that he considered it his duty as a member of the draft board to determine whether the so-called studies were or were not theological or divinity studies. (338 R 7-11.)

The minutes of action by the local board show an entry on January 8, 1951, "Appeared before board, retained in 1-A," and a notification that petitioner was retained in 1-A was mailed to him on January 9, 1951. (Govt. Exhibit No. 3.) On January 14, 1951, petitioner sent a letter of appeal to the appeal board. (Govt. Exhibit No. 8, 55 R 15-22.) Petitioner's file was forwarded to the appeal board on January 23, 1951. The appeal board affirmed the decision of the local board on February 12, 1951. (Govt. Exhibit No. 9, 58 R 22 to 59 R 3.) An order to report for induc-

tion on March 8, 1951, was mailed to appellant on February 20, 1951. (Govt. Exhibit No. 10, 62 R 1-9.)

At the time petitioner's file was forwarded to the appeal board it contained Govt. Exhibits 2 through 9, and Def's. Exhibits A, B, C, D and E. (69 R 20 to 76 R 2.)

On March 14, 1951, petitioner was indicted for violating Section 12(a) of the Selective Service Act of 1948 (C-5) and on May 14, 1951 was brought to trial. (C-10.)

On May 17, 1951, after the jury had been deliberating for almost 5½ hours, they returned to the courtroom and one of the jurors requested the Court for instructions on the list of recognized divinity schools and asked what would constitute a "recognized organization," because "that was the main issue." The Court avoided the queries. It read its previous instructions from the Selective Service Act and Regulations and told the jury they would "have to be governed by the instructions as a whole." (408 R 17 to 411 R 15.) Thirty minutes later the jury returned with a verdict of guilty. (411 R 23 to 412 R 12.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The First Amendment to the United States Constitution, as it relates to the freedom of a church to determine whether a particular phase of its training program is to be deemed a ministerial activity.

2. The Fifth Amendment to the United States Constitution, as it relates to a fair and complete hearing for a Selective Service registrant before his local draft board.

QUESTIONS PRESENTED.

1. In omitting from the written record sent to the appeal board any reference to the religious significance of the ranch work performed by petitioner, and listing his primary occupation as a "general ranch hand" and "utility worker", did the local board act in violation of Selective Service Regulations and the due process guaranty of the Fifth Amendment to the United States Constitution?

2. Where no change appeared in petitioner's file between his classification by the local board in 4-D and his re-classification by the local board into 1-A, was the trial Court in error in concluding as a matter of law that there was a basis in fact for the changed classification, and so charging the jury?

3. In failing to answer questions propounded by a juror during the jury's deliberations, directed to the meaning of an ambiguous term in the Selective Service regulations, and to instruct when requested on a list of "recognized" divinity schools admitted into evidence, did the trial Court commit prejudicial error?

4. May a government agency, a local draft board acting under the Selective Service Act, constitutionally determine whether studies in a church's program of

instruction for the ministry are or are not to be designated as theological studies?

REASONS FOR ALLOWANCE OF WRIT.

A Writ of Certiorari should be issued to review the judgment of the Court of Appeals for the Ninth Circuit for each of the following reasons:

1. The decision of the court below is in conflict with the decisions of this Court in the following cases where similar issues were involved:

Estep v. United States, 327 U.S. 114;
Cox v. United States, 332 U.S. 442;
Bollenbach v. United States, 326 U.S. 607;
Watson v. Jones, 80 U.S. 679.

2. The decision of the court below is in conflict with its own decision in *Morris v. United States* (C.C.A. 9th Cir., 1946), 156 F. (2d) 525.

3. The decision of the court below is in conflict with the following decisions of other circuit courts of appeals where similar issues were involved:

Niznik v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;
Smith v. United States (C.C.A. 4th Cir. 1946), 157 F. (2d) 176;
United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

4. The issues are of grave public importance in that constitutional rights affecting the public are here involved.

CONCLUSION.

For the reasons stated above petitioner prays that his petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
January 2, 1953.

Respectfully submitted,

PHILANDER BROOKS BEADLE,
MORTON L. SILVERS,
VICTOR E. CAPPA,
Attorneys for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW AND JURISDICTION.

The opinion below was not yet officially reported at the time of the submission of this Petition. The bases of this Court's jurisdiction are set forth in the Petition for Writ of Certiorari.

SPECIFICATION OF ERRORS.

I. The Court below erred in denying petitioner's motion for judgment of acquittal for the reason that a vital part of petitioner's claim for exemption was omitted from the record sent to the appeal board by the local board, depriving petitioner of a full and fair review by the appeal board, and violating directly regulations issued under the Selective Service Act of 1948.

II. The Court below erred in instructing the jury that there was a basis in fact for the change in petitioner's classification from 4-D to 1-A.

The Court charged:

> "I instruct you that the denial to the defendant by the local board and the appeal board of a 4-D classification is final unless it is without basis in fact. The question whether the denial of the local board and the appeal board to the defendant of the classification of 4-D was without basis in fact is a question of law for determination by the Court and not by this jury. The Court has determined that there is a basis in fact for the action of the local board and the appeal board. The Court therefore instructs you as a matter of law that there is a basis in fact for the denial to the defendant by the local board and the appeal board of the classification of 4-D. The Court therefore further instructs you that you are not to consider the matter of the validity of the classification of 1-A accorded the defendant, but you must accept it as valid." (368 R 12 to 369 R 1.)

III. The Court below erred in failing to instruct the jury, when specifically requested by a juror dur-

ing the deliberations of the jury, on the list of divinity schools admitted into evidence, and on the meaning of an ambiguous and material term which had been read to the jury—i.e., what would constitute a "recognized organization" under the Selective Service Act of 1948.

"The Court. * * * *Is there anything that you had in mind that you wished the Court's assistance on?*

Juror Elmore. *The list of schools—what is the instructions on that?*

The Clerk. *Defendant's Exhibit X.*

The Court. *I will send that in to you if you wish.*

The Juror. *Are there any instructions on that?*

Mr. Karesh. Yes, there is an instruction of 4-B that your Honor gave.

The Court. What is it?

Mr. Karesh. That is about ministers.

The Court. Show it to counsel and I will read it to the jury.

Mr. Karesh. This is the instruction that your Honor gave.

The Court. Let counsel read it.

Mr. Karesh. That is from the regulations and the Act that was read to the jury.

Mr. Crittenden. I think——

The Court. Just a moment, not what you think—is that the instruction that you wish? Pass it up and let me read it.

You are instructed that in 4-D shall be placed any registrant: (1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

Section 16. When used in this Title— * * *

(g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of doctrines of such church, sect, or organization established on the basis of a community of faith and belief, doctrines and practices of doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church,

a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

A Juror. *Can I ask a question?*

The Court. *You may ask any question you wish.*

The Juror. *What would constitute a recognized organization?*

The Court. *Well, you would have to be governed by the instructions as a whole, as the Court has given them to you. Do you have anything else in mind?*

The Juror. *That was the main issue.*

The Court. *You are to act upon the evidence and the instructions as a whole as the Court has given them to you. The jurors may retire."*

(408 R 17 to 411 R 15, emphasis added.)

IV. The Court erred in denying petitioner's motion for judgment of acquittal for the reason that

a government agency may not constitutionally determine whether studies in a church's program of instruction for the ministry are or are not to be designated as theological studies.

ARGUMENT.

I.

THE WRITTEN SUMMARY OF PETITIONER'S PERSONAL HEARING BEFORE THE LOCAL BOARD OMITTED A VITAL PART OF THE HEARING AND DEPRIVED PETITIONER OF A FULL AND FAIR REVIEW BY THE APPEAL BOARD.

It is undisputed that petitioner personally appeared before the local board on January 8, 1951 and informed them of the nature of the training he was receiving in the Theological Seminary of his Church. (229 R 1-8.)

It is undisputed that Board Chairman Dooley prepared the written summary of the personal hearing and that his comments were made "in case an appeal is taken, the Appeal Board will understand what our position was". (345 R 14-18.)

Petitioner repeatedly attempted to emphasize that he was not working merely as a general ranch hand on his Church's project in Oregan, that his activities were actually part of his ministerial training and had special religious significance. (229 R. 1-8; 260 R 2-7; 262 R 1-8; 294 R 3-12; 333 R 23 to 334 R 10.)

Selective Service Regulation 1624.2(b) (Appendix A) permits the registrant at his hearing to direct the

attention of the Board to factors which he believes have not been given sufficient weight. *The regulation then requires the Board to summarize such information in writing.*

Selective Service Regulation 1623.1(b) (Appendix A) makes it imperative that *all* information considered by the local board be summarized in writing and the summary placed in the registrant's file.

Despite this, the summary prepared and forwarded to the Appeal Board, and the *only* information before the Appeal Board as to what transpired at the personal hearing, read as follows:

> "January 8, 1951—Interview with local board Members.
>
> Employed—Paradise Meadow Ranch, P. O. Box 1152, Eagle Point, Oregon.
>
> "Primary occupation: General ranch hand, utility worker, eight hours per day, forty-eight to fifty-six hours per week.
>
> "Compensation alleged to be none, makes purchases for necessities of life from commissary upon requisition approved by manager.
>
> "Attends morning devotional service from 7:00 a.m. to 7:15 a.m. every day. Tuesday night weekly meeting consists of business meeting, ranch problems, and general discussion. Thursday night studies church literature from one hour to one and a half hours. Monday one hour per week attends sermon class. Maximum time given to church work and ranch work in ratio to ranch work one to eight.

"Local Board members after due consideration do not feel justified to grant registrant 4-D classification as per registrants request.

"Registrant to submit further evidence, file to be forwarded to the appeal board when received." (Government's Exhibit 7, R 54-55.)

Rather than presenting a fair and accurate digest of appellant's position this summary expressly distorted it. In point of fact, the local board set down the *opposite* of what had been stated to them by appellant. The prejudice to the registrant arose from the following particulars:

(1) The summary stated the registrant was "employed" at the ranch. This was untrue. No compensation was ever furnished him. There was never any agreement of employment betwen the registrant and his Church. The registrant never occupied an "employee" status.

(2) The summary stated the registrant's *"Primary Occupation"* was that of a *"general ranch hand"* and *"utility worker"*, and that this "occupation" was followed by the registrant 48 to 56 hours weekly. There was not only no mention of the ecclesiastical nature of these activities, but an *express characterization of them as secular work*—a *direct misstatement* of the registrant's remarks at his hearing.

(3) The summary stated the maximum time the registrant gave to "church work" versus "ranch

work" was in the ratio of 1 to 8. This again was an express distortion and misstatement of the registrant's position that *all* of his work was "church work", and not just 6 hours weekly.

With the uncontradicted statement of the local board before it that petitioner was employed as a ranch hand, spending only 6 hours weekly on religious matters, the Appeal Board could reach only one conclusion, viz.: the Petitioner was not a *full-time* student preparing for the ministry. This was the inevitable result of the erroneous statements contained in the summary. Petitioner could not, under Selective Service Regulations, appear in person before the Appeal Board to correct the distortion and omissions of the summary.

The Court of Appeals, in its opinion, conceded that the local board's summary was incomplete when considered alone. But it excused this defection because it found the "substantial equivalent" of the matter missing from the summary and the corrections to the distortions described above in the copy of the Church's Constitution and Canon Laws filed with the Appeal Board. (Defendant's Exhibit K, 64 R 23 to 65 R 4; 200 R 2-9.) It is respectfully submitted the Court's conclusion in this regard is entirely erroneous.

An examination of the Constitution and Canon Laws of Christ's Church of the Golden Rule indicates that nowhere in the passages that relate to student ministers and church projects can there be found the "substantial equivalent" of the missing matter.

(Church Constitution, Article 3; Canon Law #15(3); Canon Law # 22. Appendix B.)

Nowhere is there a correction of the characterization of petitioner as a "ranch hand" who spent only six hours weekly on religious activities. There is no indication anywhere in this material, or elsewhere in the Church's Constitution or Canon Laws, of the number of hours a student minister works, or how much of his time while on a project is deemed ministerial training. The Appeal Board was left with the erroneous and incomplete picture contained in the local board's written summary.

Petitioner was thus deprived of a fair hearing before the Appeal Board. He was entitled to have his case stated *accurately and completely,* in all important respects, to the Appeal Board, which was to judge him solely on the basis of the written record prepared by the local board. The regulation made it "imperative" that a complete written record be forwarded. (Selective Service Regulation 1623.1(b), Appendix A.) This was not done.

The special vice of the Board's failure to act according to the requirements of Selective Service Regulations in this instance was that here compliance with the Regulations was unusually required. Here was an illustration of unorthodox and unconventional theological training, differing sharply from the usual theological curriculum. Here the explanation offered by petitioner was vital for full understanding.

The acts of a local board contrary to the Selective Service Act or its regulations are lawless or beyond its jurisdiction and a classification and order of induction resulting from such acts are void.

Estep v. United States, 327 U.S. 114;
Cox v. United States, 332 U.S. 442.

The omission or distortion of material facts in a registrant's record invalidates the classification of the local board.

Niznick v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;;
Smith v. United States (C.C.A. 4th Cir. 1946), 157 F. (2d) 176;
United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

II.

WHERE NO CHANGE APPEARED IN PETITIONER'S FILE BETWEEN HIS CLASSIFICATION BY THE LOCAL BOARD IN 4-D AND HIS RECLASSIFICATION BY THE LOCAL BOARD INTO 1-A, THE COURT WAS IN ERROR IN CONCLUDING AS A MATTER OF LAW THAT THERE WAS A BASIS IN FACT FOR THE CHANGED CLASSIFICATION, AND SO CHARGING THE JURY.

When petitioner, on June 20, 1951, was classified 4-D, exempt from military training as a student minister, his selective service file contained:

(1) his original registration card;

(2) change of address letter;

(3) his selective service questionnaire;

(4) a letter from the Theological Seminary of Christ's Church of the Golden Rule certifying that petitioner was enrolled as a full time student minister;

(5) a sample sermon written by petitioner during his training;

(6) registrant's statement regarding classification. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10; Govt. Exhibits Nos. 1, 2, 3; Def.'s Exhibits Nos. A, B.)

On August 28, 1950, the local board reopened petitioner's classification and changed it to 1-A, ready for military training. (223 R 24 to 224 R 11.) Between June 20th an August 28th no new facts had come to the attention of the local board, so far as petitioner's file reveals. His position was precisely the same. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10.)

Selective Service Regulation § 1623.1(b) (Appendix A) reads in pertinent part as follows:

> "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file."

If the local board had determined petitioner's classification on the written information in the file, as §1623.1(b), supra, directed, it would have been compelled to grant the same classification on August 28, 1950, as it did on June 20, 1950. It did not, and

thus acted in the teeth of the regulations. "In all such cases its action would be lawless and beyond its jurisdiction."

Estep v. United States, 327 U.S. 114, 121.

It could not properly consider any facts which had not been reduced to writing. (§1623.1(b), supra.) Since no basis in fact existed for the classification given the registrant the Court was in error in concluding to the contrary as a matter of law and so charging the jury. (368 R 12 to 369 R 1.)

Estep v. United States, supra;

Cox v. United States, 332 U.S. 442.

III.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY, WHEN SPECIFICALY REQUESTED BY A JUROR DURING THE DELIBERATIONS OF THE JURY, ON THE LIST OF DIVINITY SCHOOLS ADMITTED INTO EVIDENCE, AND ON THE MEANING OF AN AMBIGUOUS AND MATERIAL TERM IN A STATUTE WHICH HAD BEEN READ TO THE JURY—I.E., WHAT WOULD CONSTITUTE A "RECOGNIZED ORGANIZATION" UNDER THE SELECTIVE SERVICE ACT OF 1948.

Petitioner's claim for exemption in Class 4-D was grounded on qualifying as a "student preparing for the ministry under the direction of a recognized church or religious organization, and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school."

Selective Service Act of 1948, U.S.C.A., 50 App. §456(g);

32 *C.F.R.* 1622.19.

A list of divinity schools circulated by California Selective Service Headquarters for the *guidance* of local boards (Def.'s Exhibit X, 333 R 14-17) did not include the theological seminary of petitioner.

The entire list of these California divinity schools was read to the jury by local board member Dooley at the request of the United States Attorney. (329 R 12 to 330 R 20.) He testified that this was a list of the "recognized" California divinity schools. (330 R 21-23.) Board member Bonzani testified the board determined whether petitioner's seminary was a proper divinity school on the basis of the list and stated, "We follow the list on the recognized schools." (357 R 6-16; 358 R 3.) There were frequent references to the list during the trial. (227 R 11-18; 331 R 23 to 333 R 17; 357 R 6 to 358 R 3.)

When a juror requested instructions from the Court on the list, after the jury had been deliberating some five hours, the Court merely read excerpts from the Selective Service Act and regulations which were in no way responsive to the query. (408 R 19 to 411 R 5.)

At the same time the Court was asked what would constitute a "recognized organization" by a juror who said "that was the main issue." It replied the jury would have to be governed by the instruction as a whole. (411 R 6-12.)

Nowhere in the instructions was there a definition or explanation of the term or of the list of schools. The Court had simply read from the Selective Serv-

ice Regulations the description of the 4-D category. (363 R 14 to 364 R 1.) The jury was left with no law applicable to the points which had been raised. The jury returned a verdict of guilty thirty minutes later. (412 R 2-12.)

In criminal cases the Court must instruct on all essentials questions of law involved whether or not the Court is requested to do so.

Thomas v. United States (C.C.A. 6th Cir. 1945), 151 F. (2d) 183;

Morris v. United States (C.C.A. 9th Cir. 1946), 156 F. (2d) 525;

Samuel v. United States (C.A. 9th Cir. 1948), 169 F. (2d) 787.

The issue was particularly important since it undoubtedly permitted, and perhaps persuaded, the jury to infer that *only* those divinity schools on the list circulated by Selective Service Headquarters were recognized, and that petitioner's church was *not* a "recognized organization".

> "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr v. United States,* 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him * * * Particularly in a criminal trial, the judge's last word is apt to be the decisive word * * * In criminal cases a conviction ought not to rest on an equivocal direction to the jury on a basic issue * * * When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."
>
> *Bollenbach v. United States,* 326 U.S. 607, 612.

> "Where the instruction or charge of the Court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts."
>
> *Morris v. United States* (C.C.A., 9th Cir., 1946), 156 Fed. (2d) 525, 529.

The Court was under a duty to instruct the jury, and especially when directly requested on the meaning of any term which is ambiguous and material to the issues. When a statute or regulations are read to the jury as part of a charge such terms should be explained and defined. The Court's failure to do so seriously prejudiced the defendant.

Douglass and Mandeville v. McCallister, 7 U.S. 298;

Western Coal & Mining Co. v. Greeson, 284 F. 510;

Milwaukee Mechanics Ins. Co. v. Oliver, 139 F. (2d) 405;

Baltimore & O. R. Co. v. Felgenhauer, 168 F. (2d) 12.

Petitioner's failure to comply with Rule 30 of the Federal Rules of Criminal Procedure at the time of trial does not, of course, preclude this Court from noticing an error which seriously affects the rights of petitioner and the integrity of judicial proceedings. Appellate courts may, of their own motion, recognize

this type of error, even though not excepted to during the trial proceedings.

N. Y. Central R. Co. v. Johnson, 279 U.S. 310, 318;

Brasfield v. United States, 272 U.S. 448, 450.

In the instant case, after deliberating five hours, the jury brought to the attention of the trial judge several points which had caused them difficulty. The Court gave non-responsive replies and avoided the points.

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."
>
> *Bollenbach v. United States,* 326 U.S. 607, 612.

The points raised by the jurors' questions were not collateral or trivial. The signifiance of the "recognized" list of divinity schools and what constituted a "recognized" organization was frequently at issue during the trial. There was obviously a conflict in the weight and value sought to be attributed to the list and the so-called "recognized" organizations. The conflict went directly to the vital point of whether the local board had acted arbitrarily and in violation of due process. The trial Court's action left the jury with the inference that the conflict had been resolved in favor of the Government's "official accredited list", and that the local board had acted properly on this point.

IV.

A GOVERNMENT AGENCY MAY NOT CONSTITUTIONALLY DETERMINE WHETHER STUDIES IN A CHURCH'S PROGRAM OF INSTRUCTION FOR THE MINISTRY ARE OR ARE NOT TO BE DESIGNATED AS THEOLOGICAL STUDIES.

The local draft board assumed it was their duty to determine if the studies prescribed by the theological seminary of petitioner's church were to be classified as divinity studies or not. (338 R. 7-11.) Upon the decision they were not to be so classified, petitioner was retained in classification 1-A.

It is petitioner's position this determination was an unconstitutional interference with the freedom of religion guaranteed under the First Amendment.

Petitioner does *not* contend that his opinion, or that of his Church, be deemed *conclusive* on his right to a IV-D, or student minister's classification. That *ultimate fact* is for the local board's determination.

But petitioner does submit that *whether a particular phase of a church's training program is to be deemed a ministerial activity is for the church to determine,* not the draft board. This question is ecclesiastical in its essence. It is a discipline in a form of worship, relating as it does to theological concepts and principles. The state should not have the right to censor such an integral religious matter.

Cantwell v. Connecticut, 310 U.S. 296;
Watson v. Jones, 80 U.S. 679, 727.

Once this determination has been made, i.e., that certain activities of the church membership are properly called ministerial training activities, *then* it is the function of the local boards to determine if the

registrant qualifies under the Selective Service Act for exemption as a student minister. This is the *ultimate fact* which is properly within the province of the local boards. Such questions as whether the registrant is pursuing his schooling (as characterized by the Church) full time, whether he is performing it satisfactorily, and the like, are all legitimate questions for the boards to resolve.

In the instant case, the local board not only determined the *ultimate fact* before it, but moved into the ecclesiastical domain of the Church and passed upon what should or should not be called ministerial training. It concluded that a certain phase of registrant's training should be called "general ranch work". In doing so, it acted in violation of the First Amendment to the United States Constitution.

V.

CONCLUSION.

Petitioner respectfully submits that his petition for a writ of certiorari should be granted on the grounds set forth above.

Dated, San Francisco, California,
January 2, 1953.

PHILANDER BROOKS BEADLE,
MORTON L. SILVERS,
VICTOR E. CAPPA,
Attorneys for Petitioner.

(Appendices A and B Follow.)

Appendix A

Selective Service Regulations

"§1624.2 *Appearance before local board.*

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. *The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file.*" (Emphasis added.)

"1623.1 *Commencement of Classification.*

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his classification Questionnaire (SSS Form No. 100) within the time allowed by section 1621.10 of this chapter, or (2) he has been separated from the armed forces of the United States and the local board determines that he may be classified properly without requiring him to complete and return a Classification Questionnaire (SSS Form No. 100),

or (3) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish. *Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file.* Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file. None of the provisions of this section shall impair the power of the local board to take notice of the birthday of any registrant and of the fact that the Congress has made registrants of his age liable for induction for military service and in the absence of any other information, when the registrant has failed to furnish such information within the time prescribed, to classify the registrant as available for military service." (Emphasis added.)

Appendix B

Church Constitution, Article III

"* * * The Senior Elder shall be elected by the duly chosen representatives of the several student minister training projects of the Church, at a convention of such representatives called for that purpose."

Canon Law No. 15 (3)

"*Student Ministers*—those who are studying for the ministry of the Church, upon admission to such status by duly constituted authority of the Church, but not yet admitted to law/or ordained membership. This is a probationary status."

Canon Law No. 22

"A 'project manager' shall be any person having any classification of ecclesiastical membership who is duly authorized and empowered by the duly constituted ecclesiastical Church Government to assist those on the project in applying Christianity as taught, construed and defined by the duly constituted Church Government to everyday life. Such project manager is an ecclesiastical official of the Church Government, and shall be selected from among those designated by the Ecclesiastical Head of the Church Government to be entrusted with a position of trust and confidence.

"A 'project' is any group, undertaking or activity in which one or more persons under these canon laws undertakes to apply and illustrate

Christianity as taught, construed and defined by the duly constituted Church Government to every-day life. A project may or may not be owned in whole or in part by some temporal agency of the Church, or it may be owned by some individual and temporarily dedicated to such use without affecting, impairing or lessening the ownership of the individual therein. No property, other than money gifts and gifts of services shall be accepted by any temporal agency without the consent of the ecclesiastical church Government. Such assent may be conditional or absolute."

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 536

ROBERT RUSSELL TYRRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (C.R. 39-47 [1]) is reported at 200 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered November 3, 1952 (C.R. 48). A petition for

[1] The clerk's record of proceedings in the Court of Appeals is herein designated "C.R.", and the reporter's transcript of the district court proceedings by the designation "R."

rehearing was denied December 10, 1952 (C.R. 49). The petition for a writ of certiorari was filed January 7, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, claiming deferment from selective service as a full-time student for the ministry, was deprived of due process in the local selective service board's submission of his claim to the appeal board, in that the local board's summary of an oral hearing given petitioner did not state petitioner's argument that his manual ranch labor in a cooperative church project was considered a part of his instruction, where the file submitted to the appeal board included extensive church literature and statements of petitioner to substantially the same effect.

2. Whether the trial judge erred in instructing that there was a basis in fact for petitioner's I-A classification.

3. Whether, in light of the entire body of instructions to the jury, the trial judge erred in failing to give a special instruction to an inquiring juror with respect to the Selective Service System's list of recognized divinity schools and with respect to what would constitute a "recognized organization."

4. Whether a local board's determination that manual ranch work is not instruction for the ministry involves unconstitutional inference with religion.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Selective Service Act of 1948 and regulations issued thereunder are set forth in the Appendix, *infra,* pp. 21-27.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Ninth Circuit (C.R. 48) unanimously affirming the judgment of the District Court for the Northern District of California imposing a sentence of three years' imprisonment on petitioner (C.R. 23-25), upon the verdict of the jury (C.R. 16), for violation of Sec. 12(a) of the Selective Service Act of 1948 by refusing, on March 9, 1951, to be inducted into the armed forces.

Petitioner, on June 12, 1950, filed his questionnaire with his local draft board (R. 46), including therein a request for classification in class IV-D as a student preparing for the ministry under the direction of an organization named Christ's Church of the Golden Rule; he stated that he was a "full-time student (minister)," and attending a training "project" of the organization at Lake Creek, Oregon, and that he had been six years in attendance at the church pursuing study as a student minister. He left blank the portions of the questionnaire in which compensation and agricultural occupations were to be described (Gov. Ex. 3 [Series VI, 3; VIII, 1(c), 6(c); IX; X, 3; and REGISTRANT'S STATEMENT REGARDING CLASSIFICATION]; R. 256).

On June 13, 1950, petitioner supplemented his questionnaire with a letter to the Selective Service System, dated June 7, bearing a letterhead, "Theological Seminary, Christ's Church of the Golden Rule" (R. 221; Def. Ex. B), and he also furnished, no later than August 28, a "miniature sermon" dated April 22, 1950 (R. 68; Def. Ex. A). The letter bore a San Francisco address and stated that petitioner was "registered and enrolled as a full-time student minister in the Theological Seminary" and that "[h]e is * * * pursuing his studies, sincerely endeavoring to become qualified to teach, preach and illustrate the precepts of the great wayshower * * *." The letter was signed by "(Rev.) Lewis B. Hart, D.D., Ph.D., M.A., Assistant Dean of the Faculty" (R. 181; Def. Ex. B). The sermon stated, *inter alia*, " * * * as a group we can show by our living example the practical import of Christ Jesus' teachings * * * " (Def. Ex. A).

On the back of the questionnaire appears an entry dated June 20, 1950, through which several lines have been stricken. The entry reads "classified 4-D. Form 110 mailed. MSB 3-0" (R. 48; Gov. Ex. 3). No testimony was adduced to indicate when or by whom the entry was stricken out, whether to indicate an error or otherwise (R. 48). The chairman of the draft board testified that the initials were those of a former clerk of the board who was without authority to make a classification, and that the 4-D classification, applicable to ministers or divinity students, was not made by

the board (R. 340-341).[2] The next entry, bearing the initials of the chairman of the draft board, is a classification of petitioner as I-A, dated August 28, 1950, by vote of three to nothing (R. 48; Gov. Ex. 3)[3] The entry indicates mailing of a notice of this classification to petitioner (R. 49), but petitioner testified he did not receive the notice (R. 170, 222, 224-225). On December 5, 1950, petitioner was sent a notice to appear for physical examination on December 18 (R. 49; Gov. Ex. 4). He appeared on that date, took the examination, and asked for a duplicate of the notice of classification as I-A (R. 50, 223-224; Gov. Ex. 5). Petitioner made no request for a board hearing at that time (R. 225), but after he was notified that he had passed the physical examination, he did ask for a board hearing (R. 225).[4] The hearing was allowed and took place on January 8 before the chairman and one other member of the board. The hearing was summarized from handwritten notes of the

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[2] Petitioner received the notice of classification as IV-D late in June or early in July (R. 221-222; Def. Ex. U) and the "classification book" also shows this entry (R. 90-92). Another board member had no recollection of the action (R. 353).

[3] The chairman of the board testified that in making this classification the entire file was considered, including petitioner's age, background, address in Oregon, the lack of listing of the purported divinity school in the Selective Service System lists, and the prospective result that, if there actually were other facts to warrant the deferment, the I-A classification would bring the registrant in to explain (R. 343-344).

[4] This statement of the order of events is petitioner's testimony. His letter requesting a hearing is dated December 22 (R. 225), while the formal notice that he had passed the examination was sent January 2 (R. 51).

chairman as follows (R. 54-55):

> January 8, 1951—interview with local board members.
>
> Employed—Paradise Meadow Ranch, P. O. Box 1152, Eagle Point, Oregon.
>
> Primary occupation: general ranch hand, utility worker, eight hours per day, forty-eight to fifty-six hours per week.
>
> Compensation alleged to be none, makes purchases for necessities of life from commissary upon requisition approved by manager.
>
> Attends morning devotional service from 7:00 a.m. to 7:15 a.m. everyday. Tuesday night weekly meeting consist of business meeting, ranch problems, and general discussion. Thursday night studies church literature from one hour to one and a half hours. Monday one hour per week attends sermon class. Maximum time given to church work and ranch work in ratio to ranch work one to eight.[5]

The board noted, at the hearing, that petitioner's seminary or project was not included in a list of divinity schools furnished to the local board by the Selective Service System (Def. Ex. X), but, as further testified by the chairman, "[t]he list of schools would not be binding on us at all if we felt that the young man, whoever he might be, was not actually * * * engaging in some phases of studies

[5] The chairman of the board testified: "We were seeking to determine whether or not the man was actually studying for the ministry or whether he was actually engaged in farm work, which perhaps did not have in our opinion a relation to the study of religion or preparing himself for the ministry" (R. 327).

which relate in our opinion to the study of the ministry or preparing himself for the study of the ministry" (R. 332). The chairman further testified that he did not tell petitioner that his church was not recognized, since "there was no occasion for that" (R. 328).[6]

The board chairman testified that he fully understood petitioner's contention that a godly act "was tantamount to the study of religion", but that while the board would not determine what should be the curriculum for divinity students, it would have to determine whether mere performance of manual labor for the church, accompanied by obtaining all the necessities of life thereby, was the subject of the deferment here in question (R. 334, 338-339).[7]

Petitioner's testimony concerning the hearing,

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[6] The chairman further stated (R. 328): "We were not in a position to determine whether the religion was recognized. The only point we had before us was whether or not the young man was attending a recognized divinity school." And see R. 348-349. The other member of the board testified that for the purpose of determining whether the school was or was not a divinity school, the list was used—"We follow the list on the recognized schools" (R. 357-358).

[7] Both members of the board specifically denied any cutting-off of conversation and asserted that there was, instead, an effort to adduce all the facts (R. 327, 350).

On cross-examination the Chairman testified (R. 333-334):

> Q. Did he explain this that you call work on the ranch was part of his religious training prescribed by the church?
>
> A. He didn't explain. He asserted. He stated that the performance of the work was the godly act, and that was tantamount to the study of religion. And I, of course, expatiated and said, "Well, if that be the case, then every young man who comes before this board could say, if he is driving an automobile as a chauffeur, mechanic, or

while conceding that there was a basically fair and friendly hearing (R. 295-297), adduced some matters denied by the board members. He stated that the board informed him that his organization was not listed as a church and could not be accepted as such (R. 227, 260, 263, 273, 292, 298, 308; Gov. Ex. 8), and that he was prevented by the flow of questioning from pointing out that his organization was in truth a church (R. 227-228, 309). He did not "remember" whether he initiated the discussion of his manual work on the ranch or whether this was elicited from him, for the first time, by the board's questions, stating, "I told them that when they asked me" (R. 261). He testified that the board's questioning prevented him from making adequate explanation of how cutting wood on the ranch, driving trucks, feeding cattle, or yard work were part of the "studies," in that they were practical application of the organization's teachings, the board apparently considering as studying only the time spent on meetings, "writing sermons and studying", and the board remarking that anyone could do the manual work (R. 228-231, 253-254, 260, 262-264, 294, 309; cf. testimony of the Board Chairman, *supra*).

Petitioner further testified that, in general, he considered it a denial of religious freedom if every member of draft age in his organization were not

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if he is engaged in any other occupation, that equally well he could say that he is studying for the ministry by performing his work for the love of God." I said, "Unfortunately we could not very well adopt that policy, otherwise we would not have any Army."

granted deferment as a minister (R. 286-287). He admitted that his questionnaire and its attached statement had presented his oral contention before the board, i.e. that the ranch work was part of the study as demonstrating the teachings of Christ "in every day affairs" (R. 294-295).

Having been advised by the board of his right to appeal and to submit additional information, petitioner duly filed his notice of appeal, dated January 14, 1951, and sent the board two items of literature concerning Christ's Church of the Golden Rule, and three additional miniature sermons by himself, dated October 28, November 11, and November 25, 1950, respectively (R. 55, 232-233, 235; Gov. Ex. 8; Def. Ex. C, D, E, J, K). One of the items of literature was entitled "Essence of the Teachings" of the organization (Def. Ex. J) and the other was a bulletin of a 1948 convention of the organization embodying its constitution and "Canon Laws" (Def. Ex. K). The "Essence of the Teachings" stated, at several points, that a major purpose of the organization was to provide a working model of the practicability of Christ's teachings; it referred to the whole project indiscriminately as a "ministry" without ascertainable differentiation of any smaller group as ministers (Def. Ex. J, pp. 3, 13, 19). The constitution and canon laws, while establishing various "ecclesiastical" and "temporal" bodies, and a "College of Pastors" and while empowering the ecclesiastical "organization" to provide for "ordination" (Def. Ex. K: Const. II, p. 5, V (2) p. 7, VII;

Canon Law #3, p. 13, #5), likewise referred to the entire organization as a ministry and established no definite separate group as ministers nor any curriculum for becoming a minister in the ordained sense.[8] Petitioner's three miniature sermons were brief, general statements of principle, exhibiting no biblical or scholastic citations or references to indicate training in such matters, and stressing that the organization's "Crusade" required the actual living of the principles, as in "[o]ur getting along with each other on our Church projects" (Def. Ex. C, D. E).

Petitioner's entire file, including the above items, was on January 23, 1951, sent to the appeal board which, on February 8, sustained the I-A classification by a vote of 4-0 (R. 59, 71-76, 98-99, 101-102, 110, 233, Gov. Ex. 9). On March 9, 1951, petitioner refused to be inducted, stating this to be "because of my religious training and belief", and that he "just could not take part in anything that had to do with war" (R. 119, 126, 133-134).

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[8] Lack of financial compensation for work was not here available to differentiate any separate group of ministers since all members shared such status (Def. Ex. K, Canon Laws, p. 17 par. (1)). The "student ministers" were defined as persons not yet admitted "to lay or ordained membership. This is a probationary status." [The petition, App. B, p. iii, contains a typographical error, terming it "law membership", rather than "lay membership."] Thus, a person could be a student minister and be attempting to attain lay membership, rather than ordained membership. Lay members were defined as those who wished to dedicate their lives "to the ministry of the Church" (Def. Ex. K, Canon Law # 15 (3), (5)). The definition of a "project" was not restricted to the ordinary concept of a seminary but merely an enterprise in which a group "undertakes to apply and illustrate Christianity" (Def. Ex. K, Canon Law # 22, p. 23).

At the trial, in addition to the evidence above summarized, three members of petitioner's organization—Lewis B. Hart, the Assistant Dean of the Faculty of the Seminary, who had signed the letter to the Selective Service Board, Mrs. Marion Huff, a member of the Elected Delegates Committee, and Harold V. Norris, the chairman of that committee—testified that the major portion of the "study" consisted "in obedience to instructions and the practical demonstration" (R. 187, 201, 213, 215, 312). The Assistant Dean testified that the organization was founded in 1944 (R. 193), that he did not know the names of others of the faculty, despite his being assistant dean (R. 193-194), that he had had no contact with petitioner since meeting him several years before (R. 196), that he had certified full-time student status as to petitioner upon the basis of reports of a committee or of a "class leader", neither of whom he could name (R. 197-198). Mrs. Huff admitted that she had spoken with petitioner only two or three times, and did not know what hours he devoted to studies (R. 218). She testified that there were no academic requirements for the ministry (R. 211), that there was no definite time for training (R. 212), and that no one had yet been ordained (R. 212). Norris testified that the course of instruction for the ministry in the church "is the regular curriculum that we are all taking, and how they perform it is judged by the examining board" (R. 313), that the examining board consisted of "affiliates" and not ministers (R. 316), that he be-

lieved that there were "a great number of teachers" at the seminary, that "[they] can be practically any of our people who qualify" (R. 316-317).

The judge, in charging the jury, read to it in full (R. 363-365) the part of the Selective Service Regulations which authorize a IV-D classification for "a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school" or "leading to entrance into" such a school.[9] He instructed, *inter alia,* that the decisions of local boards "shall be final except where an appeal is authorized" (R. 365) or unless "without basis in fact" (R. 368), that no classification is permanent and that a board would not be precluded from reopening a IV-D classification and reclassifying as I-A (R. 366), that the jurors were "not to decide what classification the defendant should have been given" (R. 366), that the question of whether there was any basis in fact was one of law (R. 368), and that there was here a basis in fact for the denial of IV-D classification by the local and appeal boards (R. 368-369).

He further charged the jury, however, that it must acquit if it found that the classification was "solely on the basis of prejudice and without any

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[9] The portions of Section 1622.19 of the regulations quoted by the judge, including the quotation of Section 16 of the Act, appear *infra,* Appendix, pp. 23-25.

evidence" (R. 369), or "because of [petitioner's] religious beliefs or affiliations" (R. 372), or that the board, at the oral hearing, prevented full statement or argument.

ARGUMENT

1. Petitioner's first contention rests upon a two-fold claim that "all information considered by the local board [must] be summarized in writing" (Pet. 19) and that the board chairman's notes of certain facts thus deprived petitioner of a fair hearing by failing to make a specific reference to petitioner's argument that his preponderantly manual labor on the ranch must be considered full-time instruction for the ministry (Pet. 18). The argument misconceives the regulation (Sec. 1624.2) requiring a summary of "further information," and it misconceives, as well, the full record that was actually sent to the appeal board.

The text of the regulation in question (Sec. 1624.2, *infra,* pp. 25-26) clearly shows that when a registrant appears before the local board his mere reiteration of what is already in writing in the file is not required to be set forth in writing again. The regulation first grants the registrant the right to "direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight." There is no requirement that such argument be re-written and placed in the file. It is only with respect to the next sentence, granting the right to present "further information", that a

provision follows that "such information", if oral, is to be summarized in writing.[10]

When petitioner appeared before the board, his file already contained the clear, written contention that he was a "full-time student (minister)" of a San Francisco seminary, attending a purported training "project" in Oregon (*supra,* p. 3). The file also contained, in petitioner's supplemental statement and in his sermon and in the letter from the seminary (*supra,* p. 4), emphatic statement of the organization's basic concepts that its precepts must be lived in practice, the concepts being stated in these items in substantially as clear a form as they were ever to be explained—nebulously and guardedly—at the hearing or, indeed, at the trial itself. Moreover, petitioner himself conceded that the written material already in the file embodied what he wanted to say "but I did not know that they [the board] had seen it" (R.

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[10] As stated in *Niznik* v. *United States,* 173 F. 2d 328, 333 (C.A. 6), certiorari denied, 337 U.S. 925: "The oral information given by registrants which was required to be summarized in writing by the board, therefore, was 'further' information—information presented orally in addition to the written information or evidence already in the registrant's file. If the oral evidence introduced by a registrant on his personal appearance before the board is the same as the written evidence contained in his file, it is difficult to see how it could be said that the record on appeal, which consists of written evidence and which is composed of the registrant's complete file, does not contain the evidence presented before the local board, and how a registrant could, in such a case, be deprived of a fair hearing on his appeal through failure of the local board to summarize the same information that already appears in written form in his file." And see *United States* v. *Mansavage,* 178 F. 2d 812, 815-817 (C.A. 7), certiorari denied, 339 U.S. 931.

294-295; *supra*, p. 9). It was no "further information", nor even further *argument*, that petitioner contended that his work was full-time instruction for the ministry. The only "further information" was the detail of what he actually, physically did, and what he thus considered to be study, and this further information was set down in writing for the file. That was all that was required to be added to the file.[11]

It may be noted, further, that even if there had been a duty to reduce petitioner's argument and interpretations to writing, it is inconceivable that he was injured under the present circumstances, for no summary of his contentions could have supplied anything that was not more fully and, it is submitted, more persuasively set forth in the extensive literature of his church that was added to the file after the hearing and was sent to the appeals board, together with three additional miniature sermons by petitioner. As stated by the Court of Appeals below (C. R. 42-43):

> [T]he registrant's file that was sent to the Appeal Board by the local board included the Constitution and Canon Laws of Christ's Church of the Golden Rule which contain the tenets and doctrine that the work of an "ecclesiastical" member of the church such as Tyrrell on a "project" of the church is part

[11] The reference to summarizing of oral information, in Section 1623.1 of the regulations (*infra*, p. 25), is likewise to the summarizing of "information" and is not to be extended to cover unlimited argument and reiteration of what is already in the file.

> of its divinity studies and religious training. Thus the Appeal Board had before it the relationship between the church's creed and Tyrrell's daily labors on the Oregon ranch. Such information amounted to the substantial equivalent of the matter that was missing from the summary and, moreover, having been submitted and included in his file by Tyrrell himself, this evidential material was intended to show to the Appeal Board that the sole motive of his ranch work was the fulfillment of the precepts of Christ's Church of the Golden Rule. It will be presumed that the Appeal Board gave consideration to this situation as well as to the entire file before it in evaluating the registrant's status and classifying him as I-A.

The appeal board's failure to find petitioner to be a full-time student for the ministry is not to be ascribed to any unawareness of the contention of both the petitioner and his organization that ordinary manual work for church projects was preparation for the ministry. The board performed its function of differentiating between a "ministry" of an entire organization to the world and the ministry contemplated under the Selective Service enactments, in which only certain members of an organization are to be regarded as the spiritual leaders and in which the study was at least something more than the ordinary activity engaged in by the entire lay membership.

2. The facts set forth in the Statement herein which show that petitioner spent most of his time working on a ranch were a sufficient basis for the

trial court's instruction that as a matter of law petitioner was not "pursuing full-time courses of instruction in recognized theological or divinity schools," as the statute (50 U.S.C. App. 456(g), *infra*, p. 21) requires for exemption as a student of the ministry. Cf. *Cox* v. *United States*, 332 U.S. 442; *Estep* v. *United States*, 327 U.S. 114, 122-3.

There is no substance to petitioner's argument that, since he was originally classified IV-D on June 20, 1950, the change of classification by the Local Board to I-A on August 28, without receiving new information, shows that the latter classification must have been based on matters not in the record. In the first place, there was strong testimony that the June 20 entry of a IV-D classification was at the least an error and, more probably, an unauthorized entry (*supra*, pp. 4-5). Moreover, a board's classification can be changed if, as stated in Section 1625.2 (2) of the regulations (*infra*, p. 26), the action is based upon facts "not considered" when the registrant was classified. Any one of a number of facts [12] could have been overlooked in the June 20, 1950 evaluation of the file and been considered for the first time in a closer scrutiny in August induced, as suggested by the Court of Appeals (C.R. 44), by the intervening outbreak of armed hostilities in Korea.

3. After deliberating for some time, the jury returned for further instructions, and the judge substantially repeated the instructions, *inter alia*,

[12] *E.g.*, the discrepancy between the address of the seminary in San Francisco and petitioner's address in Oregon, or the nature of petitioner's miniature sermon and classification statement.

that there must be acquittal in the event the board's classification was solely on the basis of prejudice and without evidence, or due to religious prejudice, or in the event of inadequate opportunity for petitioner to make his statement or argument before the local board (R. 405-407). Upon a later calling in of the jury to check on the progress of their deliberations, one juror asked, "The list of schools—what is the instructions on that?" (R. 408); the judge re-read to the jury (R. 409-411) the definition of IV-D registrants (see Appendix, *infra,* pp. 23-25). A juror asked, "What would constitute a recognized organization? * * * That was the main issue". The judge replied, "You are to act upon the evidence and the instructions as a whole, as the Court has given them to you" (R. 411).

Petitioner's argument that the failure of the judge to give special instructions as to the list of schools constituted prejudicial error, misconceives the function of the jury in this case. The judge, in accordance with the decisions of this court in the *Cox* and *Estep* cases, *supra,* p. 17, had instructed the jury that, as a matter of law, there was basis in fact for the I-A classification. To have given the jury instructions on the list of schools would have encouraged them to consider the validity of the draft board's action, a matter which was not within their province. The judge properly referred the juror to his entire instructions which correctly set forth the only issues before the jury for determination.

The holding of the court that the I-A classifica-

tion had basis in fact was in effect a holding that no improper consideration had been given to the list. The file supports this conclusion. The file shows that petitioner was not devoting full time to a course of instruction. He was therefore not entitled to classification as a student for the ministry, irrespective of whether the organization itself was or was not a recognized school. See 50 U.S.C. App. 456(g), *infra*, p. 21). The board's conclusion that full time was not being devoted to instruction was amply supported in the fact that the great preponderance of the work was ordinary ranch work in a sort of cooperative enterprise from which petitioner in return derived all his living needs.

4. Petitioner contends that it is an unconstitutional interference with religion for a Selective Service board to determine whether a claimed preparation for the ministry is such or not.

But there is no constitutional right of a minister or student of the ministry to be exempted from the necessities of war (*Falbo* v. *United States*, 320 U.S. 549, 553-554; *United States* v. *Hearn*, 153 F. 2d 186, 187 (C.A. 5), certiorari dismissed, 329 U.S. 667). The Congress, as a matter of grace, has permitted an exemption in the case of a full-time course of instruction for the ministry. But there is no constitutional requirement that it must allow any religious group unreviewable freedom to call any activity it wants a course of instruction for the ministry for purposes of exemption. Cf. *Cox* v. *United States, supra*, p. 17. A Selective Service board of the registrant's neighbors is required by Congress to determine a registrant's classification,

and no enactment has restricted or is required to restrict that authority solely to rubber-stamping the claim of any organization, responsible or irresponsible, that certain physical acts constitute instruction, especially since the word "instruction" is fairly well established in common parlance.

The contention is the more astounding where, as here, the record shows a mere cooperative group in which, after eight years, no one has yet been ordained (*supra,* p. 11) and in which petitioner's activity apparently was preponderantly manual labor and, like that of the great body of the membership, far removed from any progression toward leadership in either spiritual or even ceremonial matters. By the testimony of the leaders of petitioner's sect, every member was a student for the ministry. That is obviously not the concept of study which Congress had in mind when it granted an exemption to full-time students of the ministry.

CONCLUSION

The case was decided on settled legal principles and no conflict of decisions or constitutional question is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WALTER J. CUMMINGS, JR.,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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APPENDIX

Statutes and Regulations Involved

Selective Service Act of 1948, 62 Stat. 604, 611, Section 6(g) (50 U.S.C. App. 456(g)):

> Regular or duly ordained ministers of religion, as defined in this title and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been preenrolled, shall be exempt from training and service (but not from registration) under this title.

Selective Service Act of 1948, 62 Stat. 604, 624, Section 16(g) (50 U.S.C. App. 466(g)):

> (1) The term "duly ordained minister of religion" means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and adminis-

ters the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term "regular minister of religion" means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term "regular or duly ordained minister of religion" does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

Selective Service Act of 1948, Section 12(a), 62 Stat. 604, 622 (50 U.S.C. App. 462(a)):

Any * * * person * * * who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of

the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Regulations, Title 32, C.F.R. (1949 Ed.):

Section 1622.19:

CLASS IV-D: MINISTER OF RELIGION OR DIVINITY STUDENT.—(a) In Class IV-D shall be placed any registrant:

(1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

(b) Section 16 of title I of the Selective Service Act of 1948 contains in part the following provisions:

"SEC. 16. When used in this title—* * *

"(g) (1) the term 'duly ordained minister of religion' means a person who has been or-

dained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the

creed or principles of his church, sect, or organization."

Section 1623.1:

* * * * *

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; * * * Since it is imperative that appeal agencies have available to them all information on which the local board determined the registrant's classification, oral information shall not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances shall the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file. None of the provisions of this section shall impair the power of the local board to take notice of the birthday of any registrant and of the fact that the Congress has made registrants of his age liable for induction for military service and in the absence of any other information, when the registrant has failed to furnish such information within the time prescribed, to classify the registrant as available for military service.

Section 1624.2:

* * * * *

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should

have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. * * *

* * * * *

Section 1625.1:

(a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification such as, but not limited to, any change in his occupational, marital, or dependency status, or in his physical condition. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact.

* * * * *

Section 1625.2:

The local board may reopen and reconsider anew the classification of a registrant * * * (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification * * *.

Section 1626.13:

(a) Immediately upon an appeal being taken to the appeal board by a person entitled to appeal, the local board shall prepare the Individual Appeal Record (SSS Form No. 120) in duplicate, attaching the original to the inside of the registrant's Cover Sheet (SSS Form No. 101) and placing the duplicate copy in the local board files. The local board shall carefully check the registrant's file to make certain that all steps required by the regulations have been taken and that the record is complete. If any facts considered by the local board do not appear in the written information in the file, the local board shall prepare and place in the file a written summary of such facts.

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